VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

REVIEW AND REGULATION LIST VCAT REFERENCE NOS. Z1030/2018, Z1031/2018 & Z1038/2018

CATCHWORDS

Crimes Act 1958 s 195C, 195F – Australian Harness Racing Rules 183(c), (d) and 15(d) - whether interim suspensions from harness racing should continue, where findings of guilt, conviction and sentence in the Magistrates' Court of Victoria are on appeal to the County Court of Victoria.

APPLICANT – Z1030/2018	Lisa Bartley
APPLICANT – Z1031/2018	Nathan Jack
APPLICANT – Z1038/2018	Mark Pitt
RESPONDENT	Harness Racing Victoria Racing Appeals and Disciplinary Board
BEFORE	Deputy President I. Proctor
HEARING TYPE	Hearing
DATE OF HEARING	23 and 29 November 2018
DATE OF ORDER	14 December 2018
DATE OF WRITTEN REASONS	14 December 2018
CITATION	Bartley, Jack & Pitt v HRV Racing Appeals and Disciplinary Board (Review and Regulation) [2018] VCAT 1981

ORDER

The Tribunal affirms the decision of the Harness Racing Victoria Racing Appeals and Disciplinary Board made on 16 November 2018.

Ian Proctor
Deputy President

APPEARANCES:

For Applicant:	Mr D. Sheales of Counsel
For Respondent:	Mr C. Winneke QC with Mr A. Anderson of Counsel

REASONS

What is this proceeding about?

1 On 21 November 2018, VCAT received three applications from Ms Lisa Bartley, Mr Nathan Jack and Mr Mark Pitt (the Applicants) seeking review by VCAT of the 16 November 2018 decision of the Harness Racing Victoria Racing Appeals and Disciplinary Board (RADB) dismissing appeals against the Harness Racing Stewards' (the Stewards) decision made on 26 September 2018 to suspend the Applicants from harness racing pending the outcome of a Stewards' Inquiry.

2 A VCAT hearing was scheduled on Friday afternoon, 23 November to consider applications for stay of the RADB decision. At hearing, it transpired that VCAT had no power under s 50 of the *Victorian Civil and Administrative Tribunal Act 1998* (VCAT Act) to, by stay order, alter the status quo of the Stewards' suspensions of the Applicants.

3 Given urgency of the matter, as described by the Applicants (the RADB not sharing that sense of urgency), and in the interests of efficiency, with consent of the parties I ordered that the three VCAT proceedings, arising from the three applications, would be heard and determined together and started the substantive hearing in the proceedings. One witness gave evidence that afternoon.

4 On Thursday, 29 November 2018, the hearing resumed and was completed, with this decision reserved.

5 The Applicants and the RADB agree that logically, discretion exercised in this proceeding would result in either all Applicants succeeding or failing in their VCAT applications.

Summary of events

6 On 22 June 2015, Airbournemagic (driven by Mr Pitt) won race 4 at Cobram. The registered trainer of Airbournemagic was Mr David Bartley (father of Ms Lisa Bartley).

7 Between 7 May 2015 and the day of the race, Mr Bartley had placed Airbournemagic in the care of Ms Bartley.

8 Airbournemagic had opened the betting on Bet365 at $35.00 and was backed into $4.80 when the race started.

9 The day after the race (23 June 2015) the Stewards commenced an investigation concerning the race.

10 On 13 November 2015, HRV contacted the Victoria Police and requested that it conduct its own investigation into the race. This is in the context of "Cheating at gambling offences" introduced into the *Crimes Act 1958 (Vic)* in 2013; Part 1, Division 2B -ss 195B to 195F.

11 On 28 August 2016, Victoria Police interviewed the Applicants. That day the Stewards imposed a three-month temporary restriction on each of the Applicants. On 14 September 2016, the RADB granted a stay of the Stewards' restriction.

12 On 11 January 2017, the Applicants were charged with criminal offences, discussed below.

13 With the Applicants being charged, the Stewards exercised their power under the stand down provisions of the Australian Harness Racing Rules (AHRR). AHHR 183(c) permits prohibition of horses owned or trained from being nominated for or starting in a race. AHHR 183(d) permits suspending of all licences. AHHR 15(d) permits exclusion from all racecourses.

14 On 8 February 2017, the RADB granted a stay against the Stewards' decisions.

15 I understand the Magistrates Court of Victoria held a 14-day hearing, spread over some weeks.

16 On 7 September 2018, twenty months after being charged, the Court found each of the Applicants guilty of the following charges under the *Crimes Act*, as described in reasons for decision provided by the Magistrate:

> Nathan Jack
>
> The accused is charged under the *Crimes Act 1958* section 195C as follows; the accused at Shepparton between 19 May 2015 and 22 June 2015, did engage in conduct that corrupted a betting outcome, by un-officially training the horse Airbournemagic without declaring this to Harness Racing Victoria, by unofficially housing the horse Arbournemagic at his and [his partner's]Amanda Turnbull's stables without declaring this to Harness Racing Victoria, by keeping Airbournemagic's registered trainer and stables listed as David Bartley, therefore knowingly manipulating and inflating greater regulated betting odds with regulated betting agencies regarding race 4 at Cobram on 22 June 2015.
>
> The accused is charged under the *Crimes Act 1958* section 195C as follows; the accused at Cobram on 22 June 2015, did engage in conduct that corrupted a betting outcome, by engaging in a deliberate set of activities with Mark Pitt to manipulate the results of Race 4 at Cobram on 22 June 2015. Namely, intentionally setting a fast race and manipulating the field positions of horses by overtly and continually looking behind his shoulder, by pulling up his horse Tooram Lad prior to the finish line, allowing Airbournemagic, driven closely behind by Mark Pitt, to win the race.
>
> [The Magistrates' description of charges under the *Crimes Act 1958* s 195D are not included here given the certified extract from the Magistrates' Court concerning the result of the case shows the charges were withdrawn.]

Mark Pitt

The accused is charged under the *Crimes Act 1958* section 195C as follows; the accused at Cobram on 22 June 2015, did engage in conduct that corrupted a betting outcome, by engaging in a deliberate set of activities with Nathan Jack to manipulate race 4 at Cobram on 22 June 2015. Namely, colluding with Nathan Jack and agreeing to run a fast-paced race on his horse Airbournemagic, while following closely behind Nathan Jack, by manipulating the field positions of horses and overtaking Nathan Jack in the final straight to win the race.

[The Magistrates' description of a charge under the *Crimes Act 1958* s 195D is not included here given the certified extract from the Magistrates' Court concerning the result of the case shows the charge was withdrawn.]

The accused is charged under *Crimes Act 1958* section [195F] as follows; The accused at Shepparton on 22 June 2015, did possess knowledge and information about conduct that corrupts or would corrupt a betting outcome, namely by entering into an agreement with Nathan Jack about manipulating the race and race results of race 4 at Cobram in 2015 in order to have Airbournemagic win the race while knowing that the horse Airbournemagic was trained and stabled by the successful stables of Nathan Jack and Amanda Turnbull without the knowledge of Harness Racing Victoria or regulated betting agencies, which inflated greater regulated betting odds and in doing so bet on the event, namely race 4 at Cobram 2015, winning an unknown amount.

[The Magistrates' reasons appear to wrongly referred to s 195D, in that a certified extract from the Magistrates' Court shows conviction for a charge under s 195F Use of Corrupt Conduct Information for Betting Purposes. The above paragraph appears to relate to a charge under s 195F.]

Lisa Bartley

The accused is charged under the *Crimes Act 1958* section 195C as follows; the accused at Shepparton between 19 May 2015 and 22 June 2015, did engage in conduct that corrupted a betting outcome, by un-officially training the horse Airbournemagic in conjunction with Nathan Jack without declaring this to Harness Racing Victoria, by assisting in the rehousing of horse Airbournemagic at the stables of Nathan Jack and Amanda Turnbull without declaring this to Harness Racing Victoria, by keeping Airbournemagic's registered trainer and stables listed as David Bartley, therefore knowingly manipulating and inflating greater regulated betting odds with regulated betting agencies regarding race 4 at Cobram on 22 June 2015.

[The Magistrates' description of a charge under the *Crimes Act 1958* s 195D is not included here given the certified extract from the Magistrates' Court concerning the result of the case shows the charge was withdrawn.]

> The accused is charged under the *Crimes Act 1958* section [195F] as follows; the accused at Shepparton on 21 June 2015, did possess knowledge and information about conduct that corrupts or would corrupt a betting outcome, namely, knowing that the horse Airbournemagic was trained and stabled by the successful stables of Nathan Jack and Amanda Turnbull without the knowledge of Harness Racing Victoria or regulated betting agencies, as opposed to her father David Bartley, the registered trainer, which inflated greater regulated betting odds and in doing so bet on the event with the regulated betting agency Bet365, winning a total of 2,274.24.
>
> [The Magistrates' reasons appear to wrongly refer to s 195D. A certified extract from the Magistrates' Court shows conviction for a charge under s 195F Use of Corrupt Conduct Information for Betting Purposes, and the above paragraph appears to relate to a charge under s 195F.]

17 Also on 7 September 2018, Mr Jack was found guilty, convicted and fined $20,000. Mr Pitt was found guilty, convicted and fined $15,000. Ms Bartley was found guilty and fined $5,000, without conviction.

18 Mr Jack, Mr Pitt and Ms Bartley lodged appeals against the Magistrates' Court decisions to the County Court of Victoria.

19 Under AHHR 181, the Stewards commenced investigations into the Applicants' conduct and, under AHRR 183(c), 183(d) and 15(1)(d), provisionally suspended, and, after receiving submissions from the Applicants, on 26 September 2018 suspended the Applicants until the completion of the Stewards' investigations.

20 Concerning the Stewards' investigations, with the Magistrates' Court decision subject to appeal to the County Court, the Stewards, having served materials on the Applicants, do not intend to take any further action until the County Court appeal is decided.

21 If the Applicants succeeded in the County Court appeals, such that one or more of them is no longer the subject of finding of guilt, convictions and/or sentence, it will be a matter for the Stewards as to whether they pursue the investigation/s.

22 If one or more of the Applicants fail in their County Court appeals, then presumably the Stewards will likely bring charge/s based on the fact of the convictions (see AHHR 267(1).

23 It appears the earliest the County Court may consider the appeals is early 2020 and perhaps will not do so until sometime later in 2020.

24 On 1 October 2018, the Applicants appealed to the RADB concerning the suspensions. On 16 November 2018, the RADB dismissed the appeals.

25 On 21 November 2018, VCAT received the Applicants' applications for review of the RADB's decision.

Australian Harness Racing Rules

26 Rule 181 says:

> The Stewards may, and when directed by the Controlling Body shall, conduct inquiries or investigations in such manner as they think fit into any occurrence or matter at or arising out of or connected with a meeting, race or event, or into any aspect of the harness racing industry, or into anything concerning the administration or enforcement of these rules.

27 Rule 183 provides the Stewards with the discretion to make directions pending the outcome and an inquiry and states:

> Rule 183 - Action pending outcome
>
> Pending the outcome of an inquiry, investigation or objection, or where a person has been charged with an offence, the Stewards may direct one or more of the following —
>
> (a) that a horse shall not be nominated for or compete in a race;
>
> (b) that a driver shall not drive or otherwise take part in a race;
>
> (c) that the horses of certain connections shall not be nominated for or start in a race;
>
> (d) that a licence or any other type of authority or permission be suspended.

28 Rule 15(1)(d) provides that Stewards are empowered to exclude or direct the removal of a person from a racecourse.

RADB jurisdiction

29 Under section 50J(1) of the *Racing Act 1958* (Vic) (the Act), a person may appeal to the RADB against a decision made under the Rules to impose a suspension on the person.

30 Section 500(1)(i) of the Act says that in the determination of any matter before the RADB, it may . . . make any decision or order that the Board considers is required . in the interests of justice, including the imposition of any penalty under the Rules'.

31 In *Demmler v Harness Racing Appeals and Disciplinary Board* (Review and Regulation) [2015] VCAT 648, Jenkins VP said at [38]:

> In my view, the *Racing Act 1958* is quite clear in giving broad jurisdiction to the Board, in its discretion, to conduct a rehearing as a hearing de novo, in appropriate circumstances. Equally, it is empowered to affirm the decision made by the Stewards, provided the Board is satisfied that the Stewards have afforded the Applicant a right to be heard and that their decision is justifiable in the circumstances. It is not incumbent upon the Board to substitute its own decision or be satisfied that the Stewards made the precise decision that it would have made.

VCAT jurisdiction

32 Section 83OH(1) of the Act says a person whose interests are affected by a decision made by the RADB may apply to VCAT for review of that decision.

33 In *William Galea v Harness Racing Victoria* VCAT 3 September 2013 at para 12, Nixon J provides a useful synopsis of VCAT's functions on review:[1]

> The Tribunal's functions in reviewing a decision of the Board are not appellate. On review, the Tribunal stands in the shoes of the original decision-maker and must determine the correct decision on the material before it. The review is conducted without any presumption as to the correctness or otherwise of the decision subject to review. The Tribunal is not confined to the material upon which the original decision was made and may receive evidence or material which was not before the original decision-maker.

County Court appeal

34 An appeal to the County Court from the judgement of the Magistrates' Court proceeds as a complete rehearing. Upon the hearing of an appeal the County Court must set aside the sentence of the Magistrates' Court (s 256(2)(a) of the *Criminal Procedure Act 2009*). There is a presumption of innocence and the onus remains on the prosecution to prove its case. The County Court must also warn the appellants, as early as possible during the hearing, that the appellant faces the possibility that a more severe sentence may be imposed than that imposed by the Magistrates' Court (section 256(3)).

35 However, until the County Court appeal is heard, the findings, convictions and sentences imposed by the Magistrates' Court stand.

36 Mr Sheales for the Applicants emphasised the fact that the convictions and sentences to which they are subject are on appeal and the importance of considering the presumption of innocence in criminal proceedings.

37 In my view, the RADB correctly submitted that the reason the County Court, when hearing an appeal from the Magistrates' Court, at the beginning of the hearing, sets aside the sentence of the Magistrates' Court (*Helfenbaum v Sattler & Anor* [1999] 3 VR 583 at [587]) and then exercises all powers available to the Magistrates' Court, is that during the County Court hearing there should no longer be any order on foot in respect of the matter at the time the hearing of the appeal commences. Section 256 does not render the Magistrates' Court decision void before the County Court hearing of an appeal.

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1 See also *Demmler* at [28].

Evidence of Magistrates' Court decision

38 Related to this, the RADB went on to submit that the Stewards and the RADB, and now VCAT, are properly entitled to have regard to the existing findings of guilt in the assessment of the need to protect the integrity and reputation of the harness racing industry.

39 In response, Mr Sheales submitted, that while VCAT is not bound by the law of rules of evidence,[2] given that those rules should be applied unless some sound reason for their application being dispensed with,[3] the Tribunal here should take the approach set out in s 91 of the *Evidence Act 2008* (Vic):

> 91 Exclusion of evidence of judgments and convictions
>
> (1) Evidence of the decision, or of a finding of fact, in an Australian or overseas proceeding is not admissible to prove the existence of a fact that was in issue in that proceeding.
>
> (2) Evidence that, under this Part, is not admissible to prove the existence of a fact may not be used to prove that fact even if it is relevant for another purpose.
>
> Note
>
> Section 178 (Convictions, acquittals and other judicial proceedings) provides for certificate evidence of decisions.

40 In 'Uniform Evidence Law, 13th edition', Stephen Odgers describes the operation of s 91. In the courts, "this provision does not prevent evidence being given of judgements for the purpose not of establishing the truth of facts found, but to establish the terms of the judgement and its effect".[4]

41 In *Psychology Board of Australia v Milosevic* (Occupational and Business Regulation) [2013] VCAT 12 at [33], VCAT rejected a submission that s 91 operates that evidence of the decision or judgment is not admissible to prove a fact in issue in those proceedings. VCAT took the view, that where making findings in accordance with the *Psychologists Registration Act 1987*, it should rely on the findings and convictions in the County Court, unless there is good reason not to do so.

42 Noting commentary in Pizer's Annotated VCAT Act 6th edition that VCAT should be very cautious about informing itself from factual findings or evidence in unrelated proceedings [see page 487], the decisions of the Magistrates' Court relevant here are based on charges and evidence related to these proceedings.

43 It is appropriate here to take into account the fact of the findings of guilt, the convictions of Mr Jack and Mr Pitt and the finding of guilt of Ms Bartley, the fact of the sentences, and in broad terms the nature of the findings. This is particularly so where the exercise of discretion as to

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2 See s 98(1)(b) of the VCAT Act.

3 See *Curcio v Business Licensing Authority* [2001] VCAT 423 at [26].

4 Page 678.

suspension involves balancing between public interest and private interest (see below).

The evidence

44 The RADB called two witnesses.

Mr Dale Monteith

45 Mr Dale Monteith is Chairman of Harness Racing Victoria, appointed in March 2016. He has a long and impressive history in the industry. From 1991 to 2000 he was Chief Executive of the Melbourne Racing Club. From June 2000 to December 2012 he was Chief Executive and Director of Victoria Racing Club. In 2014, he conducted a review of Northern Territory Racing on behalf of the Northern Territory Government and was the Chairman of the Tasmanian Racing Industry Review Working Group. In 2015, he was appointed to conduct an Audit of Harness Racing Victoria.

46 Mr Monteith gave broad evidence about the perilous state of the harness racing industry and the risk to the industry posed by, following the decisions the Magistrates' Court, of allowing Mr Jack, Mr Pitt and Ms Bartley to continue in the industry, including when County Court appeals are on foot. He spoke of his broad ongoing close involvement with people from all walks of life in the industry and people not understanding how, following the Magistrates' Court convictions, the Applicants could continue to train and race. I quote from his affidavit:

> In my view, maintenance of the sport's integrity and the image of the sport's integrity is the single most important issue confronting the harness racing industry. Race fixing is the most pernicious threat of all to the confidence of the racing public in the integrity of the industry.
>
> The creation of a level playing field where all participants and investors in the industry can confidently continue to support the industry knowing races are not fixed is crucial to the well-being and survival of harness racing in Victoria. It is an industry which contributes about $420 million a year to the State economy and provides approximately 4000 jobs, mainly in regional Victoria.
>
> Wagering revenues are the lifeblood of the funding of the industry and returns to participants and those that make a living therefrom are directly linked to the maintenance of high standards of integrity and the confidence of the betting public.
>
> Flat or reduced income from wagering in recent years has been and remains a major issue confronting the industry. The lack of attractiveness of harness racing from a wagering perspective is in my opinion partly attributable to an image that insufficient measures are being taken to protect the betting public from nefarious practices by participants who seek to gain an advantage over the wider industry.
>
> In the past the term "RED HOTS" was well known when describing harness racing by those outside the industry. This perception in my

> opinion significantly contributed to a general decline in the sport over the past 30 years. The new race and match fixing legislation introduced in 2013 and a more dedicated approach to protecting the betting public from race fixing and other integrity concerns has given the industry the means to address and deal with this perception.
>
> Since the Magistrates' Court decisions against the three appellants in September 2018, the matter has featured in nearly every discussion I have had when I attend harness race meetings and industry events.
>
> As it stands, most industry participants know that they have now been found guilty but cannot understand how people found guilty of these offences could be allowed to continue to be involved in the sport. This has been a common theme of discussions I have had with industry participants since the appellants were temporarily permitted to return to the industry pending the determination of this appeal. Many compare the action taken by other workplaces and bodies to stand people down when adverse findings are made.
>
> At a recent meeting of HRV's Harness Racing Advisory Council on which there are representatives of all kindred bodies, significant concerns were expressed about the message that would be sent to the public if the 3 participants found guilty of these offences are allowed to continue to be involved simply because they have appealed.
>
> The continued participation of the appellants after being found guilty by a judicial officer of race fixing offences beyond reasonable doubt would be damaging to the integrity of the industry and the public perception of the integrity of the industry. The fact that they have appealed does not change this perception. In particular the fact they have appealed does not change the public's awareness of the fact that they have been found guilty of these very serious offences. To permit their continued involvement would be damaging to the reputation of harness racing in Victoria and would further reduce public confidence in continuing to bet on the sport.

47 In cross-examination, Mr Sheales put a range of questions to Mr Monteith, to the effect that severe problems threatening the future of harness racing in Victoria are not the result of race fixing causing harm to betting turnover but rather issues such as poor management of the sport over the last decades, poor promotion to 'millennials' and insufficient prize money. Mr Monteith agreed there are examples of scandals in racing, such as the Aquanita scandal which did not cause a reduction in betting turnover. Mr Sheales and Mr Monteith had an exchange concerning betting turnover actually rising. Mr Monteith described various causes for this, noting however harness racing, in terms of this performance lags behind other racing codes.

48 In re-examination, Mr Monteith confirmed his opinion that integrity is the number one issue in harness racing, confirming that none of the issues arising from cross-examination changed his opinion.

Mr Brent Fisher

49 Mr Brent Fisher, has since August 2015 been employed by HRV as its Investigations and Compliance Manager and since August 2017 as its General Manager of Integrity. For many years before that he was a participant in the racing industry.

50 In his 31 October 2018 affidavit, he gave background evidence concerning the unfolding of events following the race in question, consistent with the chronology given above. Mr Fisher described the corruption of a race or betting event striking at the very heart of the harness racing industry. In his opinion the industry exists only if the wagering public have confidence in the product. He spoke of the betting public's trust being eroded where those found guilty of race fixing remain participating in the sport. In his view, the image of harness racing would be adversely affected in the eyes of the general public.

51 In his opinion there was a "real risk of reoffending", by Mr Jack, Mr Pitt and Ms Bartley if the Stewards' suspension was lifted given the notorious difficulty of uncovering and prosecuting race fixing, such that the fact that the Stewards had not uncovered similar conduct concerning these persons does not mean it had not occurred.

52 I comment that beyond that broad statement, there was no distinct evidence to support the thesis that if Mr Jack, Mr Pitt and Ms Bartley were permitted to continue in the industry pending the County Court appeal, there was a serious risk of them reoffending.

53 In his 23 November 2018 affidavit, Mr Fisher gave evidence of people expressing concern about the Applicants being able to participate in the industry, I assume he means until the convictions and sentences were handed down. At the time in question, it was possible VCAT would make orders such that the Applicants could participate in the 2018 Inter Dominion. Mr Fisher expressed opinion about that possibility and his opinion as to the damage it would cause the industry. However, as that did not come to pass, I do not take his opinion on that specific matter into account.

54 In evidence in chief, Mr Fisher gave evidence concerning the table of relevant betting on the harness race in question. The table showed bets placed on the race by time and at what odds. Ms Bartley and another person, described as an associate, placed bets at $35.00. The table described people as associates of the Applicants. Some of these described associates placed bets when the odds had dropped to $3.90. In cross-examination, Mr Sheales put to Mr Fisher that an analysis of who is an associate and who is not is of little value given the close relationship between people in harness racing. To an extent he agreed. Mr Sheales and Mr Fisher had a conversation concerning betting trends in the industry and provable links between changes in betting and scandals. Mr Fisher agreed that betting trends are a litmus test of the confidence of the public in the industry. Mr

Fisher agreed the Acquitana scandal has caused no observable impact on betting turnover. Neither did scandals in the greyhound industry seem to have such an effect.

55 In cross-examination, various questions were put to Mr Fisher concerning the evidential basis (my term) for his opinion that allowing Mr Jack, Mr Pitt and Ms Bartley to continue in the industry until the outcome of their County Court appeal was known would cause significant damage to the integrity of the industry. In my view his answers revealed his genuine strong conviction as to this. However, he could offer relatively little in terms of objective evidence in support, such as a lowering of betting turnover which could be reliably related to the events in question, more than a small set of examples of people writing to him concerned about the events in question and more than a few newspaper articles related to the events.

56 While Mr Sheales put to Mr Fisher a range of questions about events leading to the race in question, including trialling of the horse, perhaps matters that will be raised in the County Court appeal, these were of no great assistance here given the principles involved in exercising discretion (see below).

57 Four references from people in the harness racing industry, who I have no reason to doubt are other than well-respected in the industry, were provided on behalf of Mr Pitt and Ms Bartley. The references spoke of them as a young couple, dedicated to harness racing, with strong work ethics who have worked extremely diligently in establishing a successful horse training business. The referees spoke of the devastating effect on Ms Bartley and Mr Pitt of having to deal with the charges before the Court, the hardship that an ongoing suspension would bring on them, where harness racing is their lives. Referees spoke of support for them to remain in the industry with comments such as "the whole industry supports her", "is aware of the charges against Mark and Lisa, and supports their continued association with harness racing", "young people such as Lisa [are] the future of the harness racing industry". One referee described Mr Pitt as having, "the potential to be one of the greatest drivers & trainers that the country has ever seen" and said "the majority of the industry" supports the suspension being lifted.

Exercising the discretion

58 As I said in *Shayne Cramp v HRV Racing Appeals and Disciplinary Board* (Review and Regulation) [2017] VCAT 471, the purpose of imposing penalties under the Australian Harness Racing Rules is primarily protective, to preserve the integrity of harness racing by imposing penalties sufficient to deter a guilty party from repeating the conduct (specific deterrence), send a message to the industry concerning the fate of those who offend against

the rules (general deterrence) and to uphold the reputation of the industry with the betting public and the general public.[5]

59 Within that framework, the issue in these proceedings is whether or not to, under AHRR(c), (d) and/or 15(d), the correct or preferable decision is to permit ongoing suspensions of the applicants pending the outcome of the investigations.

60 In *Demmler v Harness Racing Appeals and Disciplinary Board* (Review and Regulation) [2015] VCAT 648, Jenkins VP said at [77]:

> … there is no question that the discretion to suspend a licence is an important mechanism, in appropriate circumstances, to maintain the integrity of the Harness Racing industry and to protect the health and welfare of horses generally.

61 Jenkins VP saw exercise of the discretion is a balancing of the above important objectives and the personal circumstances of the person who would be suspended.

62 She cited the following passage by Her Honour Justice Adamson in *Day v Harness Racing New South Wales* [2014] NSWSC 1402:

> In my view, the suspension was an action that could reasonably be characterised as being either for disciplinary purposes or for the purposes of work health and safety...
>
> The words "disciplinary purposes" ought not, in my view, be limited to the period following the laying of charges. They are apt to include an enquiry, or investigation, which may be anterior to the laying of charges. The event that triggered the interim suspension was the detection of a prohibited substance in post-race horse urine. The rules make the presentation of a horse for racing in that condition an offence. Although no charges had been laid, the plaintiffs' conduct was the relevant subject of the enquiry. Action taken by a body such as HRNSW to suspend a participant in advance of such an enquiry can, in my view, properly be characterised as being for a disciplinary purpose. The words "disciplinary purpose" connote a wider concept than, for example, disciplinary charge or disciplinary proceedings (which are regarded as sui generis in that they are concerned with protection of the public: *Wentworth v NSW Bar Association* [1992] HCA 24; 176 CLR 239 at 250-251). The interim suspension of a participant before enquiry or charge tends to protect the public interest. It ensures that the industry, which HRNSW is responsible for protecting in the public interest, is not affected by possible interference from someone in respect of whom there is prima facie evidence of a contravention. It protects a person from participating in the industry until the enquiry has determined guilt one way or another (assuming a charge is laid) and also determined the appropriate penalty.

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5 See *Corstens v Racing Victoria Limited* (Occupational and Business Regulation) [2010] VCAT 1106 at 19.

> [Justice Adamson went on to discuss suspension for the purposes of work health and safety.]

63 The Applicants emphasised the words of Jenkins VP in *Demmler* at [39]:

> … There ought be compelling reasons for suspending a licence indefinitely, while an investigation is being conducted and prior to any charges being laid.

64 However, in my view the concept of "compelling reasons", while relevant in *Demmler*, is not directly applicable here. Jenkins VP's comments were in the context that while an investigation had started, charges had not been laid. There was no related criminal proceeding.

65 Here, while the Stewards have not laid charges, Victoria Police has done so which has resulted in findings of guilt, convictions of Mr Jack and Mr Pitt and sentencing, and findings of guilt and sentence concerning Ms Bartley, now under appeal.

66 Various other cases make it clear that what is involved in deciding whether to suspend is a balancing of the protection of the industry against the personal interests of the applicant. See for example *Howson* RAT of NSW 12.4.17 at [18], *Sarina* RAT of NSW 18.8.17 [bottom of page 5] and *Haywood* RAT of NSW 10.12.12 at [45].

67 The RADB drew my attention to the decision of the Supreme Court of Western Australia in *Harper v Racing Penalties Appeal Tribunal of Western Australia and another* 12 WAR 337 where Anderson, Owen, Kennedy and Franklin JJ said at [347]:

> The prize money which is paid to successful horses is generated for the most part from betting turnover. The commissions and taxes on these bets not only provide the prize money for which the horses compete but as well, as an examination of the legislation shows, provides the cost of administration and contributes to government revenue. Hence, the very survival of the industry as well as substantial government revenue would seem to depend on encouraging the public to bet on horse racing, that is, to bet on the outcome of each race.
>
> If it is correct to think that the financial well-being of the industry depends significantly on the maintenance of betting turnover, the need to maintain integrity in horse racing, and to do so manifestly, is easily seen to be imperative and of paramount importance. It may well be anticipated that unless racing is perceived to be fair and honest, people may be discouraged from betting. This might be thought to justify stringent controls in respect to the administration of drugs to horses and the enforcement of those controls by peremptory means.

68 At [348] their Honours referred to obiter dicta of Sir Thomas Bingham MR in *R v Disciplinary Committee of Jockey Club; Ex parte Aga Khan* [1993] 1 WLR 909 at 914.

> The powers which the Jockey Club exercised in the present case (to order the taking of samples, to fine and to disqualify) are among those assumed by the Jockey Club to safeguard the integrity of British racing. Under its rules of racing, the finding of a prohibited substance obliges the Jockey Club to fine the trainer (unless the administration of the substance is shown to be accidental) and to disqualify the horse for the race in question. The applicant has not criticised the stringency of these rules. There is no ground for doing so. For a variety of reasons, including the large sums of money which stand to be won or lost on the outcome of a single race, horse racing is an activity peculiarly prone to criminality, cheating and chicanery of many kinds. Experience no doubt shows that strong measures of control and close vigilance are necessary preconditions of fair and honest competition.

Decision

69 In balancing the protection of the industry as against the personal interests of each of the Applicants, I have considered the following factors.

70 Mr Jack and Mr Pitt have under the *Crimes Act*, been found guilty of and convicted of charges described above and sentenced. Ms Bartley has been found guilty of charges described above and sentenced for such, with no conviction recorded.

71 The relevant provisions of the *Crimes Act* were inserted by the *Crimes Amendment (Integrity in Sports) Act 2013*. In the second reading speech of in the Victorian Parliament, the Attorney-General said in part:

> Given the importance of sport, it is equally important to ensure the integrity of sporting events is maintained and that public confidence is not undermined. The fixing of matches and other sporting events is a pernicious activity that not only defrauds honest punters, but also undermines the confidence of fans and the broader community in the sport itself and in the players and other participants in the sport. …
>
> … the fixing of sporting matches and other events will not be tolerated in Victoria. It is a key component of the government's commitment to a strong policy and legislative framework to protect the integrity of sports in Victoria, integrity which is vital if the confidence and passion of Victorian sports lovers is to be secured for future generations.[6]

72 Cheating in racing is inimical to the harness racing industry, as to all codes of horse racing. The fundamental premise of the punter betting on a race is that the race is fair, not fixed. In the broad, I accept allowing persons found guilty of, convicted of and/or sentenced for race fixing, under legislative provisions relatively recently introduced into the *Crimes Act*, to continue as participants in the industry while they appeal a lower court decision, undermines confidence in harness racing.

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6 Hansard, pages 809 and 810.

73 The opinions of Mr Monteith and Mr Fisher carry significant weight as to the threat to the integrity of harness racing posed by race fixing. The impacts as described in their opinions, clearly genuinely held and the result of many years in the industry in various roles ring true. I accept their opinions.

74 I accept the point made by Mr Sheales via cross-examination and submission, that on close examination, there is a lack of strong evidence, in an actuarial or accounting sense (my words), of a clear inter-relationship between a decline in betting turnover and a particular scandal or scandals, of which there are, unfortunately, a number to choose from.

75 However, such evidence is difficult to obtain, particularly when there may be any number of factors influencing betting turnover in a given time. These include, as was discussed in the course of the giving of evidence in this proceeding, fluctuating numbers of races in a given year, the prize money on offer in a given code and the related number of people entering horses in the races, the effectiveness or otherwise of the promotion of one or more of the racing codes and the perception of those interested in racing as to whether where there is corruption, whether the authorities are doing something about it

76 While strong objective evidence of the attitudes of those involved in the industry and whether scandal and cheating drive them from the industry, is lacking, again such evidence is difficult to obtain.

77 Against that, there are people in the industry who say the industry supports the continuing involvement of the Applicants in the industry, at least until the County Court appeal is decided. I gather from the references that there are those who believe Mr Pitt is a highly talented horse driver and his loss will be the industry's loss. Some believe Ms Bartley is an asset to the industry. Mr Jack is of course a leading driver.

78 Turning to the circumstances of the Applicants, continuing suspensions will have severe consequences for them. At a minimum, if they are successful on appeal, at the earliest a possibility apparently sometime in 2020, they will have been excluded from the industry for over a year, an industry to which they have dedicated their lives. This will cause severe financial hardship among much other hardship.

79 I reject the submission on their behalf that their offending, as found by the Magistrates' Court, was of an opportunistic nature. The term "opportunistic" connotes a chance to do something that came along and without much consideration the wrong path was taken and acted on.

80 It is evident from the Magistrate's comments in this matter that while an opportunity presented, the Magistrate concluded each of the Applicants was involved, on the basis of the opportunity involved, in a calculated attempt at offending.

81 I reject the submission that the Applicants should be accorded the presumption of innocence at this stage and in the context of this decision. That presumption fell away when they were found guilty. The presumption of innocence will now only be restored once the County Court judge set aside the Magistrates' Court conviction for the purposes of holding the appeal, until either they are acquitted by the Court or found guilty, possibly followed by conviction and sentence.

82 That said, the apparent long delay until the appeal will be heard, perhaps in early 2020, perhaps later in 2020 is of great concern.

83 I am not persuaded by Mr Fisher's opinion that suspension is required, either because the applicants may have engaged in previous undetected corrupt conduct and/or there is a risk that they would do so if the suspensions were lifted. There is no persuasive evidence to this effect. It would be extraordinary if a convicted person/s offended further while convictions were on appeal to the County Court.

84 There is little if any precedent to assist me with this decision. As far as I am aware, this is the only case of the Stewards exercising the discretion in question to suspend in the context of findings of a Court under the relevant provisions of the *Crimes Act*, then appeal to the County Court, with that appeal not yet decided.[7]

85 In written submissions, Mr Sheales cited stays of suspensions decided this year by VCAT in VCAT proceedings Z383/2018 Vasil v Racing Victoria Limited (order of 18 May 2018) and Z367/2018 Birchley v Racing Victoria Limited (order of same date). These proceedings related to the 'Aquanita matters'. Mr Shields submitted, Mr Vasil and Mr Birchley had been "convicted of very serious charges".

86 I understand Mr Sheales to be referring to decisions of the RADB currently under review at VCAT, disqualifying Mr Vasil for three years and Mr Birchley for one year, in the context of others being disqualified for life. Those are matters of a different nature, compared to findings of guilt, convictions of Mr Jack and Mr Pitt and sentencing of the three Applicants, under the *Crimes Act*, by the Magistrates' Court.

87 The appropriate balance is clear, that the causes of protecting the integrity of the harness racing industry and providing a strong message of deterrence to those in the industry who may be tempted to cheat outweighs the very significant personal interests of each of the three Applicants, who are the subjects of the Magistrates' Court decisions discussed above, where the Court's decisions are under appeal.

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7 The *Shayne Cramp* case, referred to above, and the related *Greg Cramp v HRV Racing Appeals and Disciplinary Board* (Review and Regulation) [2017] VCAT 472, related to convictions under the Crimes Act to which both of the Cramps had pled guilty.

88 Put another way, the fact of the Magistrates' Court decisions are at least a strong, some might say compelling, reason for allowing the suspensions to continue.

89 It was unsurprising that on two occasions the RADB stayed decisions of the Stewards suspending the Applicants in the period before the Magistrates' Court made its decisions. At that point, in the absence of compelling reasons, the personal interests of each of the Applicants outweighed the broader public interests as discussed above.

90 With the Magistrates' Court's findings, the balance changed, such that the RADB's dismissal of the applicants' appeals before it, should, at VCAT, be affirmed.

91 While I am highly mindful of the severe consequences of this decision for each of the Applicants, their personal interests, do not outweigh the interests of harness racing in Victoria.

Ian Proctor
Deputy President